MOTION FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-899

CARL MILLER, ET AL., Appellants,

v.

THE HONORABLE GERALD HEFFERNAN,
STATE TAX COMMISSIONER, Appellee.

On Appeal From the
Supreme Court of Connecticut

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF CONNECTICUT LEGAL FUND AS AMICUS CURIAE

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MOTION OF CONNECTICUT LEGAL FUND
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

Pursuant to this Court's Rule 42, Connecticut Legal Fund hereby moves the Court for leave to file the attached brief as amicus curiae. While the appellants have cooperated with the preparation of this brief amicus curiae, the appellee has not consented as of the time of this filing.

Connecticut Legal Fund was organized in 1976 as a Connecticut not-for-profit corporation engaged in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on the preservation of the freedom traditionally enjoyed by the people of Connecticut and the nation. The purpose of Connecticut Legal Fund is to provide legal representation and to assist other organizations in providing legal representation in matters of public interest at all levels of the judicial process.

As a public interest law foundation, Connecticut Legal Fund is dedicated to representing the interest of the public in full presentation of constitutional issues which may be determinative of judicial decisions affecting individuals throughout Connecticut. While the parties

are fully qualified to represent their own immediate interest, a decision of such broad scope as that below should be considered in light of the interest of all.

Additionally, Connecticut Legal Fund's brief presents to this Court federal court decisions showing that the challenged statute's definition of "taxpayer" substantially burdens the exercise of a federal statutory right, and discriminates against persons exercising such, in violation of the Equal Protection Clause of the United States Constitution. This is a different aspect of the issue presented than that which the appellants, at least in their drafts, presented in their jurisdictional statement, and which this Court should have a full opportunity to consider.

Connecticut Legal Fund submits that its view of this appeal will be of value to the Court, and respectfully urges the Court to

grant this motion for leave to file the attached brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set out in the Motion for Leave to File, supra.

THE QUESTION PRESENTED

Whether this Court should note probable jurisdiction of this appeal as presenting a substantial federal question whether a state statute denies equal protection by burdening the exercise of a right or privilege granted by federal law.

ARGUMENT

Jurisdiction -- Final Judgment

As stated by appellants in their jurisdictional statement, they brought this action for a refund of the dividends tax which they paid to the State of Connecticut. The constitutional issues were reserved by the Superior Court for the advice of the Connecticut Supreme Court, which issued its advice upon such issues, including the present issues of federal constitutional law, on September 27, 1977.

The court or judge making such a reservation is required by Connecticut statute to conform, in the judgment, decree or decision made in such a case, to the advice of the Connecticut Supreme Court. Conn. Gen. Stat. §52-235 (Rev. to 1977). The decision of the Connecticut Supreme Court upon a reservation finally settles the issues and no appeal to a Connecticut court lies from the trial court's judgment entered in accordance with the advice given. New York, N.H. & H.R. Co. v. Fair Haven & Westville R. Co., 71 Conn. 584, 590, 42 A. 652 (1899);

Husted v. Mead, 58 Conn. 55, 66 (1889). This Court has held that a decision such as that made by the Connecticut Supreme Court is a "final judgment or decree" within the meaning of 28 U.S.C. §1257. Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d. 328 (1975).

Substantial Federal Question -- Discrimination Against a Federal Right

The Connecticut Dividend Tax Act defines one "taxpayer" so as to include a married couple filing a joint federal income tax return. Such definition has the effect of providing but one $20,000 exemption to such a couple and denying the two exemptions to which the couple would be otherwise entitled. This definition imposes a potential burden of $1400 upon a couple which exercises its federal privilege to file jointly. Such privilege was enacted in order to adjust the differences between couples residing in states whose community property laws effected a splitting of income and couples residing in states, such as Connecticut, without such laws. The effect of the

Dividend Tax definition of "taxpayer" is to impose a higher tax upon many of those exercising a federal right and serves to frustrate and impede the federal policy expressed in the joint filing option.

In its opinion below, the Connecticut Supreme Court cited decisions in support of its conclusion that such a burden does not violate the Equal Protection Clause. Such authorities, however, did not involve situations in which a state imposed a clear, palpable burden upon the exercise of a valid right provided by federal law.

The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Accordingly, a state may not impose a charge upon the enjoyment of a right guaranteed by the Federal Constitution, Ibid, or impose a material requirement solely upon those who refuse to surrender a constitutional right. Harman v. Fossenius, 380 U.S. 528, 540, 85 S.Ct. 1177, 14 L.Ed.2d. 50 (1965).

This limitation extends beyond constitutional rights and deprives the states of power to retard, impede, burden or in

any measure control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the federal government. Nash v. Florida Industrial Comm., 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d. 438 (1967); McCulloch v. Maryland, 4 Wheat. 316, 436 (1819). This limitation applies even absent manifestations of congressional intent to occupy the field in enacting legislation; DeCanas v. Bica, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d. 43 (1976); however wise the state statute; Franklin Nat. Bank of Franklin Square v. New York, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed. 767 (1954); and regardless of the state legislature's motive. Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d. 233 (1971).

The appellant's challenge to the Dividends Tax is based upon the Equal Protection Clause of the Constitution, rather than the Supremacy Clause. This Court has repeatedly held that a state may not discriminate against rights accruing under federal laws, and has affirmed the decision of the Court of Appeals for the Eighth Circuit that the enforcement of a

statute discriminating against such rights denies equal protection of the laws. Republic Pictures Corp. v. Kappler, 327 U.S. 757, 66 S.Ct. 523, 90 L.Ed. 991, rehearing denied 327 U.S. 817, affirming 151 F.2d. 543 (8th Cir. 1945). This principle has been applied in other federal courts which found a denial of equal protection in the enforcement of state statutes discriminating against the exercise of federal rights. Caldwell v. Alabama Dry Dock & Shipbuilding Co., 161 F.2d. 83 (5th Cir. 1947); Van Horn v. Lukhard, 392 F.Supp. 384, 390 (E.D.Va. 1975).

CONCLUSION

The Dividends Tax Act definition of "taxpayer" classifies differently couples which are alike in all respects except in regard to their election whether or not to exercise a federal statutory right. The Act imposes a substantial financial burden upon couples exercising such right. Such burden impedes and frustrates the federal policy expressed in the joint

filing option. The appellants' challenge to such statute presents a substantial federal question upon which this Court's ruling should be obtained after being fully briefed and argued upon the merits. The Connecticut Legal Fund, amicus curiae, respectfully submits that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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